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No. 91-453

In The

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of South Carolina

REPLY BRIEF ON THE MERITS

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REPLY BRIEF ON THE MERITS

Pursuant to Supreme Court Rule 24.4, the Petitioner, David H. Lucas, respectfully submits this Reply on the Merits.

ARGUMENT

I. THIS MATTER IS RIPE FOR ADJUDICATION.

Respondent, South Carolina Coastal Council, maintains, Resp. Br. 8-12, that Petitioner has failed to exhaust administrative remedies available to him, and, as a consequence, this matter is not ripe for adjudication. More specifically, Respondent claims that section 48-39-290(D)

of the South Carolina Beachfront Management Act ("the 1988 Act"), S.C. Code Ann. § 48-39-10 *et seq.* (Law Co-op. 1990) (reprinted at Pet. App. 125), adopted in June 1990, provides the Petitioner with the possibility of seeking a special permit from the South Carolina Coastal Council at any time.[1] The United States apparently agrees. U.S. *Amicus* Br. 8-10. Petitioner respectfully maintains, however, that this argument is without substance.

1. The entire posture of this case has been dictated by the trial court's finding that the South Carolina 1988 Act had worked a total and *permanent* taking of the Petitioner's property. Presiding Judge Patterson of the Circuit Court of Charleston County found that the South Carolina Coastal Council's regulation against building went into effect against Mr. Lucas's property sometime after July 1, 1988. *See* Common Pleas Order, at 3, *reprinted at* Pet. App. 35. Judge Patterson also found that the prohibition of construction on Mr. Lucas's property was *permanent*. *Id.* at 5, *reprinted at* Pet. App. 37. This finding of fact was not disturbed on appeal. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 896 (S.C. 1991).

As has already been noted, Pet. Br. 28 n.5, the South Carolina Supreme Court, in rendering its judgment in this case of February 11, 1991, did not need to consider the impact of the 1990 amendment.[2] The South Carolina

[1] Respondent does concede, Resp. Br. 9 n.4, that no other administrative remedy was previously available to the Petitioner.

[2] The majority in *Lucas* was, otherwise, clearly aware of the 1990 Amendments. *See Lucas*, 404 S.E.2d at 896 n.2.

Coastal Council sought to brief this issue, but its request was denied by that court. Resp. Br. 5, 9. By deciding the merits, the South Carolina Supreme Court implicitly held that Mr. Lucas had a ripe claim for compensation under the Constitution's Fifth Amendment.

2. Any alleged administrative remedy granted in the 1990 Amendments was inadequate and unavailable. Recourse to it would have been futile. The 1990 Amendments allowed an aggrieved property owner to seek a special permit from the Council in order to build or rebuild a structure seaward of the baseline. 1990 Amendments, § 3, *codified at* S.C. Code Ann. § 48-39-290(D)(1). A property owner, in applying for a special permit, covenants to remove the offending structure if the Council in its unfettered discretion determines it is "detrimental to the public health, safety or welfare." *Id.*

The Respondent has consistently made clear that it would not grant a permit to the Petitioner. Tr. 108-09, J.A. 7. The Respondent also stipulated that "any application for a permit to build would have been denied." Stipulation ¶ 16, J.A. 16. Respondent has nowhere suggested how the 1990 Amendments would have resulted in a change of heart for the permitting authorities, or would have mandated any action different from that announced by the Council in 1989. The law of this case is that Lucas will get no permit and the Act has resulted in a *permanent* taking. In short, Respondent's claim that Mr. Lucas should now apply for a permit, in order to be eligible for judicial review, is rather disingenuous.

To withhold compensation in this case, the majority of the South Carolina Supreme Court held that for Lucas

to build his home would be detrimental to the public health, safety, and welfare. *See Lucas*, 404 S.E.2d at 898. Respondent has strongly argued this same point. Under the 1990 Amendment, in this case's present posture (the lower court having found that to build would be a "great public harm"), Respondent would have to tell Lucas to tear down any house built under such a special permit.

This Court has consistently held that lack of finality will not be found where the purported administrative remedy is inadequate. *See Gibson v. Berryhill*, 411 U.S. 564, 575 (1973) (hearings before state regulatory board); *McNeese v. Board of Education*, 373 U.S. 668, 674-75 (1963) (civil rights case); *Union Pacific R. Co. v. Weld County*, 247 U.S. 282, 287 (1918) (collection of illegal tax). There is also a collateral notion that where recourse to administrative remedies would be futile, the case remains justiciable. *See Monongahela Connecting R. Co. v. Pennsylvania Public Utility Comm'n*, 373 F.2d 142, 146 (3d Cir. 1967) (challenge of railway regulation); *Collin v. Smith*, 447 F. Supp. 676, 683 (N.D. Ill.) (attempts to seek parade permit were futile), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); *City of Altus v. Carr*, 255 F. Supp. 828, 833-34 (W.D. Tex.) (regulation of groundwater mining by special legislative leave), *aff'd*, 385 U.S. 35 (1966).

3. Ripeness rarely presents a definitive bar to jurisdiction, and this Court has acknowledged that what must be "evaluate[d] [is] both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967) (described in *Pacific Gas & Elec. Co. v. State Energy Comm'n*, 461 U.S. 190, 201 (1983),

as the Court's "leading discussion" of the ripeness doctrine). There is no question that Mr. Lucas has been denied compensation under every relevant theory. The South Carolina Supreme Court's nuisance reasoning is as applicable in denying that a compensable temporary taking occurred as it is to a permanent taking. This is not, therefore, a case in which "further proceedings are necessary to resolve the federal question whether there has been a taking at all." *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 633 (1981).[3]

If there is further fact-finding to be done on the temporary taking issue, it would be solely limited to the proper level of just compensation due to the Petitioner. Respondent is correct in noting that the Council did reserve at trial the right to further litigate this aspect of the temporary takings question. But this question is quite distinct from the ruling, already made by the South Carolina Supreme Court, that there was no compensable taking here because Mr. Lucas's intended use of his land amounted to a public hazard. This was the issue presented to this Court.

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[3] None of the cases upon which Respondent relies, Resp. Br. 8-12, *Agins v. Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *McDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986), involved situations in which the law was changed after a period in which a taking indisputably occurred. They all concerned the quite different circumstance in which a temporary claim was brought while the process of government decision-making about the subject property was still continuing.

II. PETITIONER'S *PER SE* RULE IS THE PROPER RULE FOR TOTAL TAKES.

The question for determination by this Court remains whether the government can so fully regulate land in a way that prevents all viable economic use or value, and still evade just compensation under the Fifth Amendment merely because the regulation is made pursuant to legitimate police powers.[4] The South Carolina Supreme Court has succeeded in insulating from a takings challenge *all* land-use regulations properly based on police powers. The crux of Petitioner's submission to this Court is that this result overturns *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and returns us to a time when regulations of property were not subject to Just Compensation claims under the Fifth Amendment. This cannot be the law of the land.

Petitioner properly relied on the recent statements of this Court saying that if a regulation "denies an owner economically viable use of his land" that it constitutes a taking. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *see also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295-96 (1981). We have here the admittedly rare case of a total taking by regulation of the "economically viable use" of land. The trier of fact so

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[4] The Petitioner does not and has never challenged the State's exercise of its police power. But in foregoing this challenge, Petitioner does not concede that the South Carolina Supreme Court correctly identified "the character of the government's actions."

found, and the South Carolina Supreme Court upheld that finding. It was, indeed, essential to the South Carolina Supreme Court's holding that it made absolutely no difference how much value was taken from the land, because any beneficial use of the property was harmful to the public. *Lucas*, 404 S.E.2d at 900-01.

Hard as Respondent tries in arguing the contrary, there is no real dispute in this case that all of Mr. Lucas's economically viable use and value of his land was taken by the operation of the 1988 Act. The trial court found that Mr. Lucas's property was suitable for the purpose it was intended under existing land-use regulations: the construction of homes. *See* Common Pleas Order, at 1-2, *reprinted at* Pet. App. 33-34. The trial court found that the 1988 Act worked a permanent and total taking, thus frustrating Mr. Lucas's legitimate, investment-backed expectations. Respondent attempts to relitigate these findings. Resp. Br. 40-50. The South Carolina Supreme Court chose not to do so and there is no reason for this Court to do so either.

Petitioner's *per se* rule is a sensible rule of decision precisely because it is premised on a finding that there has been a total or virtual taking of the economically viable use or value of real property.[5] It is nearly

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[5] The contention made by Respondent, Resp. Br. 45-50, and some of its *amici*, *see, e.g.*, National Growth Management Leadership Project *Amicus* Br. 17-21, that there is a distinction to be made in this case between the residual value of Mr. Lucas's property and its unregulated uses, is frankly laughable. Once again, the trial court found, despite Respondent's evidence to the contrary, that there had been a total take here.

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impossible to imagine a case where the only beneficial or economically viable use of land was a noxious, harmful use. By its very nature, real property is almost invariably susceptible to a variety of uses, and this fact distinguishes land from other forms of property. Moreover, unless the noxious use of land was recently proscribed, it would be impossible for the claimant to prove a total diminution in value. In cases where there has been a radical change in policy towards certain land uses and that land is so restricted as to eliminate any economically viable use by the owners, Petitioner maintains that the public as a whole must bear the cost of the new socially-decided preference.

III. ANY EXCEPTION TO THE TAKINGS GUARANTEE MUST BE NARROW AND SEVERELY CIRCUMSCRIBED.

If the Court chooses not to adopt the rule of decision suggested in total taking cases, there remains the corollary of Petitioner's submission. In order to dispose of the case, the South Carolina Supreme Court qualified all police power regulations as directed against public harms, in order to insulate them from takings challenges

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The reason why courts often look to the fair market value of property (before and after a regulation) is because it is the single best measure of the "economically viable" use of land. After all, as Lord Coke "long ago said, 'What is land but the uses thereof?' " *The People v. Kerr*, 37 Barb. 357, 399 (N.Y. App. Div. 1862). All attempts by Respondent to enter into evidence any residual value amounts were excluded by the trial judge as speculative. Trial Tr. 150.

under a "nuisance" exception.[6] Petitioner has asked this Court to hold that such a facile determination empties the Just Compensation Clause of all meaning.

No matter which standard is used to define a "taking," the facts of this case remain constant. Mr. Lucas has two vacant lots and on each side, in this alleged danger area, are homes. Up and down the beach are houses and condominiums built just as Lucas would build his home. Under Respondent's and its *amici's* theory, Mr. Lucas cannot build any structure because of its alleged potential danger, while the other structures are allowed to stay. All the similar structures have to be a nuisance under Respondent's theory. The reasoning of Respondent and its *amici* would, in effect, allow the state to clear the beach. Without an "objective and non-manipulable" definition of a nuisance, "the police power would swallow the Just Compensation Clause." U.S. *Amicus* Br. 18.

For argument's sake, Petitioner has attempted to elucidate such a standard by a two-prong test. Pet. Br. 37-45.[7]

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[6] The so-called nuisance exception is more properly described as a conflict of rights exception. *See Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Mugler v. Kansas*, 123 U.S. 623 (1887). *See generally Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 144-46 (1978) (Rehnquist, J., dissenting).

[7] A very good argument can be made that the only time a state can eliminate property rights without paying compensation is when there is a conflict in the property rights held by adjacent landowners. Consider the difference in results between the Court's decision in *Miller v. Schoene*, 276 U.S. 272 (1928), and its decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). In *Miller*, the State restricted the rights of

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The first inquiry is whether the danger being addressed is of a magnitude and imminence to consider any categorical denial of compensation.[8] The second condition is that the land-use regulation's primary purpose must be directed against a present danger, and not to bestow a benefit upon the public.

The fundamental premise of the first inquiry is that the government must clearly and convincingly demonstrate that a particular land-use activity poses such an imminent and compelling danger to public safety that its regulation amounts to a public necessity. Petitioner agrees with the Solicitor General that the best common law analogy for circumstances warranting government action without compensation lies in the realm of public necessity. *See* U.S. *Amicus* Br. 13-14.

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landowners to grow cedar trees in order to prevent cedar rust from infecting nearby apple orchards. The *Miller* Court upheld the measure against a takings challenge. In *Pennsylvania Coal Co.*, the state restricted the coal companies' right to mine the support coal in order to prevent the collapse of buildings and homes overlying the coal mine. In *Pennsylvania Coal Co.* the Court struck down the measure as a taking.

[8] Respondent in its Brief vainly attempts to balance three criteria: (1) Economic Impact, (2) Character of the Government Action and (3) Reasonableness of investment-backed expectations. No one can seriously question that the economic impact on Lucas is a decrease in value from one million dollars to zero. Nor can one argue that Mr. Lucas's investment-backed expectations were anything other than to be able to build houses like those beside his lots. Respondent is, therefore, arguing for a categorical denial of just compensation because the act is for the health, welfare, and safety of the public.

The notion of public necessity contains a key element absent in the concept of public nuisance. This is the sense of urgency. A necessity is a circumstance which is instant and overwhelming, often leaving no choice of means and little moment for deliberation. As one court has noted, "[p]ublic necessity . . . is that urgent, immediate public need arising from existing conditions, which . . . justifies a disturbance of private rights that otherwise might be legally exempted from such interference." *In re Shelton St. R. Co.*, 69 Conn. 626, 629, 38 A. 362, 363 (1897).[10] When a regulation is designed to handle a temporary and urgent situation, necessity gives the State the freedom to act on behalf of its citizens. The basis of this contention is found in the "common law [which] has long recognized that in times of imminent peril . . . the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved." *United States v. Caltex*, 344 U.S. 149, 154 (1952). Once the peril has passed, of course, the necessity for confiscatory action likewise disappears.

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[9] Certain uses of land – particularly the construction and occupation of a dwelling – are presumptively deemed under the common law *not* to be nuisances. Building a private residence on one's own land is a fundamental right of property ownership, which "cannot remotely be described as a 'governmental benefit'." *Nollan v. California Coastal Comm'n*, 483 U.S. 825 n.2 (1987).

[10] The pre-*Mugler* cases are a restatement of the public necessity notion. *See, e.g., Commonwealth v. Tewksbury*, 52 Mass. (11 Met.) 55, 57-58 (1846) (compensation would only be denied in cases where the regulation responds to an activity which is "injurious to the public," and only in cases "[a]mounting to an obvious public exigency.").

From the earliest times, *see, e.g., King's Prerogative in Saltpetre*, 12 Co. Rep. 12, 77 Eng. Rep. 1294 (K.B. 1607) (allowing Crown to enter land and dig for saltpetre "for the defence of the realm"); *Mouse's Case*, 12 Co. Rep. 63, 77 Eng. Rep. 1341 (K.B. 1607) (jettisoning chattels from sinking boat), the doctrine of public necessity has been justified by extraordinary urgency. The jurisprudence of this Court has been consistent in recognizing public necessity only in the most grave of situations.[11] These are, in fact, the *only* cases decided by this Court in which a complete taking of an owner's property interest in land has been permitted without just compensation.

The imminence of danger conveyed by the public necessity doctrine would be decisive in limiting the scope of a so-called "nuisance exception" in which a government could regulate hazardous land-use activities without triggering the Takings Guarantee of the Fifth Amendment. Land-use regulations could still be adopted by legislative action. But the threshold justification for uncompensated takings would be raised. Unless a showing of imminent danger is made, the government must still compensate landowners for regulations which effect

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[11] *See Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134-35 (1851) (destruction of property by military officer constituted a public necessity, but was still compensable); *Bowditch v. Boston*, 101 U.S. 16 (1880) (house destroyed to stop an advancing fire); *Peabody v. United States*, 231 U.S. 530, 538-40 (1913) (artillery testing necessary for national security); *Portsmouth Harbor Land & Hotel Co. v. United States*, 250 U.S. 1, 2 (1919) (same); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 165-69 (1958) (War Board closure of gold mines in order to preserve manpower during World War Two).

a taking of a property interest in land. And, as noted above, even if there is an imminent peril, once it has dissipated the government must either discontinue the confiscatory regulation or render compensation for it.

Petitioner believes that this standard of public necessity would successfully distinguish cases in which the government is seeking an exception to the Takings Guarantee. As an additional safeguard, it is submitted that the primary purpose of the regulation must also be examined. This would ensure that public necessity is not being used as a pretext in order for the government to promote some public benefit in the private property being regulated. *See* Pet. Br. 38-41. Petitioner does not suggest that this prong, standing alone, would well-serve courts in cases such as this. Although some state supreme courts have upheld a takings claim on the finding that the regulation was primarily intended to promote a public benefit in the affected land, *see, e.g., Annicelli v. Town of South Kingston*, 463 A.2d 133, 140 (R.I. 1983) ("[t]he overall purpose of the ordinance in question is to benefit the public welfare by protecting vital natural resources, here barrier beaches, and preserving them for posterity"), Petitioner agrees that it is sometimes difficult for courts to divine the primary intention of a land-use regulation. Nevertheless, this element of the analysis should still be recognized by this Court as significant.

No exception to the Just Compensation Clause should be made when there is a total take. If an exception is to be established it must be narrowly drawn. Petitioner believes that the two-pronged test, propounded above and in his Brief on the Merits, comes closest to remaining

true to the Constitutional text and its fundamental wisdom that the protection of individual property rights is "the first object of government." *The Federalist* No. 10, at 78 (James Madison) (Clinton Rossiter ed. 1961).

CONCLUSION

The judgment of the Supreme Court of South Carolina should be REVERSED.

Respectfully submitted,

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